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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

POINT REYES SEASHORE LODGE;
JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN,

Petitioners,

v.

HOLLYNN DELIL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Respondent on January 2, 2003 filed her complaint for violations of the Americans With Disabilities Act of 1990, (*42 U.S.C. § 12101*) in the United States District Court for the Northern District of California and claimed damages pursuant to corresponding state law. The merits of the underlying litigation were resolved by settlement at a mandatory settlement conference held before the U.S. Magistrate. The magistrate informed the district court that a partial settlement had been reached, but Respondent's claim for attorney's fees remained unresolved. The case was thereafter dismissed with prejudice by the district court. (App. 16, DE 37)

Delil v. Point Reyes Seashore Lodge, et al. (App. 1-15) involved (1) whether the Respondent filed her motion for attorney's fees within the deadline established by the local rules of court which are essentially the same as *Rule 54(d)(2)* of the *Federal Rules of Civil Procedure*; and (2) whether the district court after dismissing the action with prejudice retained the jurisdiction to grant Respondent's motion for attorney's fees pursuant to Civil Local Rule 54-6, which is based on the language of *Fed. R. Civ. Proc. 54(d)(2).*

This Petition for Writ of Certiorari is presented to the Court (1) to resolve a conflict between the other Courts of Appeals and the 9th Circuit concerning the applicability of the time limits set out in *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure* to

QUESTIONS PRESENTED FOR REVIEW – Continued

an application for attorney fees and (2) to resolve the interpretation of important federal procedural rules which have not been previously decided by this Court regarding whether a dismissal with prejudice entered in accordance with *Rules 58(a) and 79(a) of the Federal Rules of Civil Procedure* is a "final order" that can only be vacated by the entry of an order of the district court following a motion brought pursuant to *Rules 59(e) or 60(b).*

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. Point Reyes Seashore Lodge, is a California corporation. Jeffrey F. Harriman and Thomas R. Harriman are the only shareholders and own 100% of the stock. The shares of the corporation are not publicly traded.

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PETITION FOR WRIT OF CERTIORARI

Following a settlement and dismissal of an action, a district court awarded attorney's fees to one of the parties, based upon an application made outside the time periods set out in *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure* and the local rules of the Northern District of California. (App. 4-15) This award was beyond the jurisdiction of the district court. Accordingly, Jeffrey F. Harriman, Thomas R. Harriman, and Point Reyes Seashore Lodge, a California corporation, respectfully petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit entered on November 16, 2007. (App. 1-3)

This Petition should be granted in order:

(1) to resolve the interpretation of important federal procedural rules which have not been previously decided by this Court regarding:

(a) Whether a dismissal with prejudice entered in accordance with *Rules 58(a) and 79(a) of the Federal Rules of Civil Procedure* is a "final order";

(b) that can only be vacated by the entry of an order of the district court following a motion brought pursuant to *Rules 59(e) or 60(b)*; and,

(2) to resolve a conflict between the other Courts of Appeals and the Ninth Circuit concerning the applicability of the time limits set out in *Rule*

54(d)(2)(B) of the Federal Rules of Civil Procedure to an application for attorney fees.[1]

The memorandum decision of the Ninth Circuit in ***Delil v. Point Reyes Seashore Lodge*** (App. 1-3) affirmed the award of attorney's fees to the Respondent by the district court pursuant to *42 U.S.C. § 12205* and held, *inter alia,* that:

(1) the timely filing by the Respondent of a motion for attorney's fees pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Procedure* or Civil Local Rule 54-6 of the Northern District of California was superfluous, which is in conflict with the holdings of other Circuits in ***Quick v. Peoples Bank of Cullman County***, 993 F.2d 793 (11th Cir. 1993); ***Weyant v. Okst***, 198 F.3d 211 (2d Cir. 1999); ***Allen v. Murph***, 194 F.3d 722 (6th Cir. 1999); ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003); ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006); ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005);

(2) the holding in ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375

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[1] The U.S. District Court for the Northern District of California pursuant to *Fed. R. Civ. Proc. 83* has enacted as a local rule Civil Local Rule 54-6 which corresponds to the procedure set forth in *Fed. R. Civ. Proc. 54(d)(2)* for the application for an award of attorney's fees by the district court.

(1994) was inapplicable to the dismissal with prejudice entered by the district court since it was a conditional dismissal; and,

(3) the district court retained subject matter jurisdiction since the dismissal with prejudice was automatically vacated by the filing of a certificate by the Respondent that all issues had not been settled.

The Court is presented with a decision by the Ninth Circuit which essentially ignored the applicable federal and local procedural rules and sanctioned several questionable procedural applications of the *Federal Rules of Civil Procedure* in reaching the decision, as well as the holding that a timely motion for attorney's fees was superfluous, which is clearly in conflict with the holdings of other Circuits that have addressed the issue.

Consequently, the petitioners respectfully request that the decision of the Ninth Circuit in this matter be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit is dated November 16, 2007 and it is not published in the Federal Reporter, but is published at ***Delil v. Point Reyes Seashore Lodge,*** 2007 U.S. App. Lexis 26991. (App. 1-3) The Order denying the Petition for Rehearing, dated December

14, 2007, is not published. (App. 23) The Order of Judge Susan Illston of the United States District Court for the Northern District of California, dated August 9, 2005, awarding the Respondent statutory attorney's fees (App. 4-15), and the Order entered on March 24, 2004, dismissing the action with prejudice (App. 16) and the August 26, 2004 Order (App. 21-22) are not published.

JURISDICTION

The civil action filed by the Respondent in the District Court for the Northern District of California was pursuant to the Americans With Disabilities Act of 1990, *42 U.S.C. § 12101.* Subject matter jurisdiction of the district court was pursuant to *28 U.S.C. § 1331* and the district court had supplemental jurisdiction over the state law claims pursuant to *28 U.S.C. § 1367.* The appellate jurisdiction of the Court of Appeals for the Ninth Circuit was pursuant to *28 U.S.C. § 1291.* Jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1).*

The memorandum of decision by the Court of Appeals for the Ninth Circuit was filed on November 16, 2007. (App. 1-3) A Petition for Rehearing was timely filed and was denied on December 14, 2007. (App. 23) Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of the denial of the petition for rehearing.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, RULES, AND REGULATIONS INVOLVED

The Respondent was awarded statutory attorney's fees pursuant to *42 U.S.C. § 12205* which provides that: "In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs. . . ."

The following are the excerpts of the relevant *Federal Rules of Civil Procedure*:

Rule 6(b) provides that:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 41(b) provides, *inter alia*, that: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, . . . operates as an adjudication upon the merits."

Rule 54(d)(2) provides, *inter alia*, that:

> (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
>
> (B) Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

Rule 58(a)(1) provides that: "Every judgment and amended judgment must be set forth on a separate document. . . ."

Rule 59(e) provides that: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

Rule 60(b), provides, *inter alia*, that:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment.

Rule 79 provides, *inter alia*, that:

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" . . . , and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, . . . all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court . . . The entry of an order or judgment shall show the date the entry is made. . . .

(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the

> approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order . . . and any other order which the court may direct to be kept.

The District Court for the Northern District of California by local rule has established the procedure for applying for an enlargement of time and for the timely filing of a motion for statutory attorney's fees within the Northern District of California pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure.*

Civil Local Rule 6(b) for the Northern District of California provides that:

> A Court order is required for any enlargement or shortening of time that alters an event or deadline already fixed by Court order or that involves papers required to be filed or lodged with the Court (other than an initial response to the complaint). A request for a Court order enlarging or shortening time may be made by written stipulation pursuant to Civil L.R. 6-2 or motion pursuant to Civil L.R. 6-3. Any stipulated request or motion which affects a hearing or proceeding on the Court's calendar must be filed no later than 10 days before the scheduled event.

Civil Local Rule 54-6 provides, *inter alia*, that:

> Unless otherwise ordered by the Court after a stipulation to enlarge time under Civil L.R.

> 6-2 or a motion under Civil L.R. 6-3, motions for awards of attorney's fees by the Court must be served and filed within 14 days of entry of judgment by the District Court. Filing an appeal from the judgment does not extend the time for filing a motion. Counsel for the respective parties must meet and confer for the purpose of resolving all disputed issues relating to attorney's fees before making a motion for award of attorney's fees.

The local rule further had a caveat in its "Commentary" following Rule 54-6 which stated as follows:

> A short time period of only 14 days from the entry of judgment for filing a motion for attorney's fees is set by FRCivP 54(d)(2)(B). Counsel who desire to seek an order extending the time to file such a motion, either by stipulation (See Civil L.R. 6-2) or by motion (See Civil L.R. 6-3), are advised to seek such an order as expeditiously as practicable.

STATEMENT OF THE CASE

The Respondent on January 2, 2003 filed her complaint for violations of the Americans With Disabilities Act of 1990, (*42 U.S.C. § 12101 et seq.*) in the United States District Court for the Northern District of California and claimed damages pursuant to corresponding state law. The merits of the underlying litigation were resolved by settlement at a mandatory

settlement conference held before U.S. Magistrate Edward M. Chen on March 12, 2004. The magistrate informed the district court that a partial settlement had been reached, but attorney's fees remained unresolved. (Docket, App. 26, DE 36)

The procedural history following the settlement is a matter of record. The interpretation of and adherence to the *Federal Rules of Civil Procedure* and the Civil Local Rules for the Northern District of California by the district court and the Ninth Circuit Court of Appeals is the focus and thrust of this petition.

The procedural problems commenced immediately following the on-the-record settlement at the mandatory settlement conference when the district court **dismissed the entire action with prejudice on March 24, 2004** but attached a caveat to the dismissal by stating in the order that: " . . . if any party hereto certifies to the court, with proof of service of a copy thereon on opposing counsel, within ninety days hereof, that settlement has not occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings." (App. 16)

Since the Respondent did not request the March 24, 2004, dismissal with prejudice, that dismissal should be considered involuntary; it was pursuant to the provisions of *Fed. R. Civ. Proc. 41(b)*, that is, it was a dismissal which was not specified in *Fed. R.*

Civ. Proc. 41 and the dismissal operated "as an adjudication upon the merits."

Generally a dismissal with prejudice terminates the entire action and is considered a final judgment and appealable when entered. See ***Glick v. Ballentine Produce***, 397 F.2d 590, 593 (8th Cir. 1968); see, e.g., ***Flood v. Harrington***, 532 F.2d 1248, 1250 (9th Cir. 1976). The district court after the dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(b)* loses subject matter jurisdiction over the claims asserted in the complaint. See ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994).

Normally, an involuntary dismissal would be considered a judgment on the merits for the Petitioners since no relief was granted to the Respondent. See ***Zenith Ins. Co. v. Breslaw***, 108 F.3d 205, 207 (9th Cir. 1997); ***Schwarz v. Folloder***, 767 F.2d 125, 130 (5th Cir. 1985).

Regardless, following the March 24, 2004 dismissal with prejudice (App. 16), the parties continued to draft the terms of the written settlement agreement which was eventually executed by all parties by May 10, 2004. (App. 18)[2] Consequently, the caveat attached by the district court to the finality of the dismissal with prejudice was fulfilled by May 10,

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[2] A copy of the executed settlement agreement is attached to a subsequent dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(a)(1)(ii)* which was entered on July 19, 2004. (App. 17-20)

2004, within the ninety days specified in the order. (App. 16)

However, following the mandatory settlement conference on March 12, 2004, the dispute between the parties concerning the Respondent's claim for statutory attorney's fees continued unabated and was not resolved by the terms of the settlement agreement. Nevertheless, given the obvious ongoing dispute between the parties concerning the Respondent's claim for statutory attorney's fees, the Respondent did nothing procedurally pursuant to the local rules to preserve the issue for resolution by the district court after the dismissal with prejudice.[3] (Docket, App. 24-41)

Civil Local Rule 54-6 required an applicant for an award of attorney's fees by the court to file a motion within 14 days after the entry of judgment, in this case the dismissal with prejudice. (App. 16) Consequently, if the Respondent desired to preserve her right to seek statutory attorney's fees pursuant to *42 U.S.C. § 12205*, Civil Local Rule 54-6 required the Respondent to file her motion for fees at the earliest by April 7, 2004 (14 days from March 24, 2004) or, if the dismissal with prejudice was a valid conditional

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[3] It should be noted that a dismissal with prejudice has been construed by the Fifth Circuit to be tantamount to a judgment on the merits for the purpose of filing a motion for attorney fees pursuant to *Fed. R. Civ. Proc. 54(d)*. ***Schwarz v. Folloder***, 767 F.2d 125, 130 (5th Cir. 1985); cf. ***Zenith Ins. Co. v. Breslaw***, 108 F.3d 205, 207 (9th Cir. 1997).

order, she had to file her motion by July 6, 2004, within 14 days after the order became final on June 22, 2004 (90 days after entry of the dismissal, since the conditions for dismissal were satisfied when the settlement agreement was fully executed on May 10, 2004).

The docket of the district court (App. 24-41) does not reflect that the Respondent filed any motion for attorney's fees with the district court by July 6, 2004, nor does the record reflect that the Respondent ever filed a motion for an enlargement of time to file her motion for attorney's fees as suggested by the commentary to Civil Local Rule 54-6. (Docket, App. 24-41)

The Respondent on June 3, 2004 filed a document stating " . . . that a settlement of all aspects of this lawsuit have (sic) not occurred." (App. 42-43)

The clerk of the court thereafter notified the parties that the case had been reopened and scheduled a case management conference for July 2, 2004. (App. 29, DE 46) **The docket, however, does not reflect the district court vacated the order of March 24, 2004 dismissing the case with prejudice upon receiving the certification of counsel for the Respondent, or at anytime thereafter.** (Docket 24-41)

The parties subsequently prepared a joint case management conference statement which was filed with the district court on June 17, 2004 that stated unequivocally: "The parties have resolved the injunctive relief and damages aspects of the lawsuit by

Settlement Agreement. . . ." (App. 29, DE 49) The case management conference statement further advised the court that the matter of attorney's fees had not been resolved and negotiations regarding the attorney's fee dispute were continuing with recently substituted counsel.[4]

Subsequently, another dismissal with prejudice pursuant to *Fed. R Civ. Proc.* 41(a)(1)(ii), by stipulation, was prepared which incorporated the settlement agreement and provided, *inter alia*, that: "The Court shall retain jurisdiction to interpret and enforce the terms of the 'Mutual Release And Settlement Agreement for Injunctive Relief and Damages Only' incorporated by reference herein and to render a decision on any motion made to the Court for attorney's fees, litigation expenses, and costs." (App. 17-20) The subsequent stipulated order of dismissal was entered on the docket on July 19, 2004. (App. 30, DE 54)[5] The stipulated order for dismissal did not specifically enlarge the time for the Respondent to file her motion for attorney's fees nor did the order address when the Respondent was required to file her motion for fees. (App. 17-20)

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[4] The Updated Joint Case Management Conference Statement dated June 16, 2004 is set forth in full in the Excerpts of Record on Appeal at pages 018-019.

[5] The complete order with the settlement agreement attached is included in the Excerpts of Record on Appeal at Vol. One, pp. 22-46.

After the entry of the July 19, 2004 stipulated dismissal no progress was made toward resolving the attorney fee claim of the Respondent. However, the Respondent on August 18, 2004 did file another certification with the district court which stated that " . . . settlement of the attorney's fees, litigation expenses, and costs aspects of this lawsuit have (sic) not occurred." (App. 31, DE 56) The Respondent again requested that the case be reopened and restored to the calendar.

The district court on August 26, 2004 issued an order which acknowledged that the substantive issues had been dismissed pursuant to the stipulation entered on July 19, 2004 and refused to reopen or restore the case to the calendar so that the issue of attorney's fees could be resolved. The district court did provide, however, in its order that " . . . if the plaintiff seeks to be awarded fees and costs, she may apply for same by a regularly noticed motion, which the court will hear and decide." (App. 21, 31, DE 57) Again, there was no mention in the order of a specific time or any time whatsoever for the Respondent to file the fee motion. (App. 21-22)

Following the issuance of the order of August 26, 2004 the Respondent did not seek any enlargement of time to file her motion for attorney's fees and waited another three (3) months until November 23, 2004 to finally file her motion. (App. 31, DE 58) A total of eight months had elapsed from the time the case was initially dismissed with prejudice (App. 16) until the

Respondent filed her fee motion on November 23, 2004.

The record does not reflect a single attempt by the Respondent to comply with the filing requirements of either *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure* or Civil Local Rule 54-6. (Docket, App. 24-41)

After the Respondent filed her supporting documentation and points and authorities on January 27, 2005 (App. 33, DE 63-68), the Petitioners on February 8, 2005 filed an ex parte application pursuant to Civil Local Rule 6 seeking an enlargement of time for the hearing on the motion for attorney's fees (App. 35, DE 69) In the application, the Petitioners advised the district court there was a potential argument that the Respondent had not complied with Civil Local Rule 54-6. (App. 35, DE 69)

In their opposition to the Respondent's motion for attorney's fees the Petitioners raised as issues the timeliness of the fee motion and the failure of the Respondent to seek any enlargement of time for her motion, and asserted that the Respondent had waived her rights to any statutory attorney's fees or costs by her failure to comply with the applicable procedural rules. (App. 36, DE 73)

The district court after a hearing issued an order on August 9, 2005 awarding the Respondent statutory attorney's fees and costs of $154,975. (App. 4-15)

In the Order the district court stated that the case had been dismissed on March 24, 2004 (App. 5), but nevertheless found that the Respondent was the "prevailing party" since she had obtained a judicially enforceable settlement and was therefore entitled to statutory attorney's fees pursuant to the holding in ***Barrios v. California Interscholastic Federation***, 277 F.3d 1128, 1134 (9th Cir. 2002). (App. 7-9) The Order Awarding Fees (App. 4-15) did not address or indicate that the March 24, 2004 dismissal with prejudice had been vacated, and did not discuss the applicability of Civil Local Rule 54-6. The district court noted the Petitioners' assertion that the Respondent had not complied with the timely filing requirement of *Rule 54(d)(2) of the Federal Rules of Civil Procedure,* then summarily dismissed the issue. (App. 7-9)

The district court's reasoning was as follows:

> Even if Rule 54 applies to the circumstances of this case, the Court finds that plaintiff's motion was timely. The rule provides that the motion for fees must be filed within 14 days of entry of judgment, "unless otherwise provided by statute or order of the court." The Court's Order of July 19, 2004 stated that it would retain jurisdiction over rendering a decision on any fees motion. The Order also stated that the parties should resolve the motion by negotiation if possible.

> Finally, the Court's August 25, 2004 Order[6] stated that the plaintiff could seek fees and costs through "a regularly scheduled motion."
>
> The Court finds that the August 25, 2004 Order provided that the plaintiff was not required to file her motion for attorney's fees and costs within 14 days of the stipulated dismissal, given that the Order was issued more than one month after the dismissal order. (App. 7-8)

The Petitioners timely filed their notice of appeal to the Ninth Circuit Court of Appeals on September 2, 2004. (App. 40, DE 87) On appeal the Petitioners challenged the order awarding the Respondent attorney's fees not only on the ground of the timeliness of the Respondent's motion for fees and costs under all circumstances, but also on the grounds that the district court had lost subject matter jurisdiction as a result of the order dismissing the case with prejudice on March 24, 2004, which did not retain jurisdiction over the enforcement of the settlement agreement (***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994)); thus, the Respondent could not be considered the "prevailing party." ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Resources***, 523 U.S. 598 (2001). Furthermore, the order of March 24, 2004 was

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[6] The Order was signed on August 25, 2004 and filed on August 26, 2005 and is docket entry 57 (App. 17, DE 57) and is attached hereto as Appendix Exhibit 19.

a "final order" since it was never vacated by a subsequent order entered on the docket (*Fed. R. Civ. Proc. 79(a)*, see ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 674 F.2d 6 (9th Cir. 1981)). Hence, the subsequent stipulated dismissal was void and could not be a basis for an award of attorney's fees.

The Ninth Circuit Court of Appeals in a memorandum opinion, which did not cite any authority to support its conclusions, affirmed the award of attorney's fees and costs to the Respondent, finding that the district court retained subject matter jurisdiction since the Order of March 24, 2004 was conditional. The opinion further held that **the order** of March 24, 2004 was vacated automatically when the Respondent " . . . certified that not all aspects of the lawsuit had settled . . . ," and noted that ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375, (1994) and ***Hagestad v. Tragesser***, 49 F.3d 1430 (9th Cir. 1995) which followed ***Kokkonen*** were not applicable. The rationale set forth in the Memorandum supporting the conclusion that neither case was applicable was that ***Kokkonen*** did not involve a conditional order, and in ***Hagestad*** the conditions for vacating the order had never been met. The final conclusion of the appellate court was essentially that it was a superfluous act for the Respondent to comply with the time requirement of either the local or federal rule and file her motion for fees within 14 days of the second dismissal with prejudice. (App. 1-3)

In essence the Ninth Circuit sanctioned procedures that were not authorized by statute or case law and deviated from the federal and local rules applicable to the proceeding, as well as acts by the district court that were clearly in excess of the subject matter jurisdiction of the district court.

ARGUMENT FOR GRANTING RELIEF

I. The Court should grant the petition to resolve a conflict between the decision in the Ninth Circuit and the interpretation and applications of important federal procedural rules which have not been previously decided by this Court, namely:

A. Whether a dismissal with prejudice entered in accordance with *Rules 58(a) and 79(a) of the Federal Rules of Civil Procedure* is a "final order" and can only be vacated by a separate document (an order) in accordance with the same procedural rules?

The ***Delil*** case (App. 1-15) involved (1) whether the district court after dismissing the action with prejudice retained the power to grant Respondent's motion for attorney's fees pursuant to Civil Local Rule 54-6, which is based on the language of *Fed. R. Civ. Proc. 54(d)(2)*, and (2) whether the Respondent filed her motion for attorney's fees within the deadline established by the local rules of court which are

essentially the same as *Rule 54(d)(2)* of the *Federal Rules of Civil Procedure.*

The district court *sua sponte* ordered the ***Delil*** case dismissed with prejudice. (App. 16) The order was entered on the docket on March 24, 2004 following the settlement of all substantive ADA issues at a mandatory settlement conference on March 12, 2004 before the U.S. magistrate. (App. 26, DE 37) The above procedure complied with *Rules 58(a)* and *79(a) of the Federal Rules of Civil Procedure.*

The district court was informed by the magistrate that only the collateral issue of the Respondent's claim for statutory attorney's fees remained unresolved. (App. 26, DE 36) ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196 (1988), [statutory attorney's fees are a collateral issue]. The district court in the order of dismissal did not specifically retain jurisdiction over the settlement agreement or incorporate the settlement agreement. (App. 16) See ***Kokkonen v. Guardian Life Ins. Co. of America,*** 511 U.S. 375 (1994). The order of dismissal did have a caveat that it would be vacated should a party certify to the court within 90 days that settlement had not occurred. There was no mention, however, of the necessity to resolve the Respondent's claim for statutory attorney's fees within 90 days. (App. 16)

The Petitioners contend that the order dismissing the entire action on March 24, 2004 (App. 16) was a final order that terminated the litigation.

The courts of appeals that have addressed the issue have consistently held that a dismissal with prejudice is final and appealable when entered and divests the district court of its jurisdiction to affect the substantive rights of the parties. The district court after the dismissal, however, does retain jurisdiction to rule upon collateral matters.

The Eighth Circuit held in the case of ***Glick v. Ballentine Produce, Inc.***, 397 F.2d 590, 593 (8th Cir. 1968) which involved a dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(b)* where the pleadings failed to state a cause of action that: "A dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and bars further action between the parties." See also, ***Schwarz v. Folloder***, 767 F.2d 125, 130 (5th Cir. 1985). Moreover, the court of appeals in ***Flood v. Harrington***, 532 F.2d 1248, 1250 (9th Cir. 1976) held that where the complaint and action are dismissed with prejudice, the order is final and appealable under *28 U.S.C. § 1291*; and, in ***Krull v. Celotex***, 827 F.2d 80, 82 (7th Cir. 1987) the appellate court held that the dismissal with prejudice divested the district court of jurisdiction, except for collateral matters. See, e.g., ***Hatfield v. Board of County Commrs. For Converse County***, 52 F.3d 858 (10th Cir. 1995) [motion to alter or amend judgment pursuant to *Rule 59(e)*; accord, ***Lichtenberg v. Besicorp, Inc.***, 204 F.3d 397 (2d Cir. 2000); ***Hamid v. Price-Waterhouse***, 51 F.3d 1411, 1415 (9th Cir.

1995) [motion to vacate a dismissal is a *Rule 59(e)* motion].[7]

The fact that a collateral issue regarding attorney's fees remains unresolved has no impact upon the finality of a dismissal of the action with prejudice. ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 199-200 (1988).

The dismissal with prejudice in ***Delil*** was not ambiguous. The order stated unequivocally that: "IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE." (App. 16) The order, therefore, complied with the separate document requirements of *Fed. R. Civ. Proc. 58(a)* and thus was a "final order" when entered on the docket pursuant to *Fed. R. Civ. Proc. 79(a)*. See, e.g., ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 647 F.2d 6 (9th Cir. 1981); cf. ***Bailey v. Potter***, 478 F.3d 409, 412 (D.C. Cir. 2007) [which held that when a dismissal in conformity with *Fed. R. Civ. Proc. 58(a)* has not been entered on the docket as required by *Fed. R. Civ. Proc. 79(a)* the district court retains subject matter jurisdiction].

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[7] A regional treatise interpreting the applicable pretrial procedures for the Ninth Circuit has posited that the only means available for the district court to reverse or modify a prior ruling once it has been entered on the docket is pursuant to either *Fed. R. Civ. Proc. 59(e)* or *60(b)*. See Schwarzer, Tashima and Wagstaffe, (Rutter Practice Group) *Federal Civil Procedure Before Trial*, § 12:157.

The Petitioners contend that the caveat attached by the district court to the dismissal on March 24, 2004, namely that the dismissal would be vacated and restored to the calendar for further proceedings, if a party certified within 90 days " . . . that settlement has not in fact occurred . . . " was merely placing all parties on notice, and not just the Respondent, that the court would consider the failure to consummate the settlement within 90 days "good cause" to vacate the dismissal pursuant to a motion filed in accordance with *Fed. R. Civ. Proc. 60(b)* as authorized by the holding in ***Keeling v. Sheet Metal Workers International Assn.***, 937 F.2d 408 (9th Cir. 1991).

The Petitioners maintain that without an order vacating and setting aside the dismissal of March 24, 2004 in compliance with *Rules 58(a)* and *79(a)* of the *Federal Rules of Civil Procedure*, the order remained on the docket as an order which was not amended, modified, or vacated. Cf. ***Bailey v. Potter***, 478 F.3d 409, 412 (D.C. Cir. 2007) [which held that when a dismissal in conformity with *Fed. R. Civ. Proc. 58(a)* has not been entered on the docket as required by *Fed. R. Civ. Proc. 79(a)* the district court retains subject matter jurisdiction]. The terms of the order did not contemplate any further action by the district court on the merits of the lawsuit until such time as the order was duly set aside. Consequently, the Petitioners assert that the Order of March 24, 2004 (App. 16) was a final order when entered and would remain a final order until properly vacated pursuant

to a motion made in accordance with either *Fed. R. Civ. Proc. 59(e)* or *60(b)*.

However, the court of appeals in ***Delil*** (App. 1-3), without the citation of any legal authority, held that when the Respondent certified to the district court "that not all aspects of the lawsuit had settled (App. 42-43), the order (dismissal of March 24, 2004, App. 16) was automatically vacated." (App. 2)

This holding eviscerates the procedural rules requiring the Respondent to file a *Rule 60(b)* motion and for the district court to conduct a hearing and issue findings of fact that the conditions subsequent, attached to the March 24, 2004 dismissal, had not occurred; and, thereafter file a separate document in accordance with *Rules 58(a) and 79(a)* vacating and setting aside the prior order.

The decision in ***Delil*** sanctioned a procedure for vacating a dismissal that is not authorized by the language in either *Fed. R. Civ. Proc. 59(e)* or *60(b)*, or any other reasonable interpretation of either rule. Such a novel and heretofore unprecedented deviation from the federal rules if not discouraged will cause chaos with respect to finality of orders that are of record, as well as a denial of procedural due process to the opposing party with regard to notice of the event, the right to file opposition and have a hearing

thereon, and the right to appeal the subsequent order vacating the dismissal.[8]

B. Was the entry pursuant to *Fed. R. Civ. Proc. 79(a)* of a separate order as required by *Fed. R. Civ. Proc. 58(a)* necessary to vacate the dismissal with prejudice entered on March 24, 2004?

The record on appeal does not reflect that the clerk of the district court entered on the docket an order vacating the March 24, 2004 dismissal, which is in conflict with the express holding in ***Delil*** that the order was automatically vacated. (Docket, App. 26-41)

Rule 58(a)(1) of the *Federal Rules of Civil Procedure* requires *inter alia* that: "Every judgment and amended judgment must be set forth on a separate document. . . ." Since a dismissal with prejudice is an adjudication of all the issues raised by the pleadings, it qualifies as a judgment, and an order vacating a judgment, therefore, would be an amendment to a judgment.

Moreover, for an order vacating the dismissal to be effective the order had to be entered on the docket

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[8] Unless an order is issued in conformity with *Fed. R. Civ. Proc. 58(a)* and *79(a)* there is no final order from which an appeal would lie and there would be no appellate jurisdiction pursuant to *28 U.S.C. § 1291*. See, e.g., ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 647 F.2d 6 (9th Cir. 1981).

in accordance with *Fed. R. Civ. Proc. 79(a)* which requires that the clerk of the court must keep a record of every order made and record the entry of the order on the docket of the court. See, e.g., ***Weldon v. United States***, 196 F.2d 874, 875-876 (9th Cir. 1952); ***Calhoun v. United States***, 647 F.2d 6 (9th Cir. 1981); cf. ***Bailey v. Potter***, 478 F.3d 409, 412 (D.C. Cir. 2007).

Furthermore, the holding in ***Delil*** that an order of dismissal once entered can be automatically vacated runs contrary to the application and construction of *Rule 60(b) of the Federal Rules of Civil Procedure* and the decision of this Court in ***Bank of Nova Scotia v. United States***, 487 U.S. 250, 254-255 (1988). Compliance with the procedural requirements of *Rule 60(b)* is the only manner by which an order entered on the docket can be vacated by the district court, except for fraud.[9] See generally, ***Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership***, 507 U.S. 380 (1993).

Rule 60(b) states, *inter alia*, that:

> On **motion** and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

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[9] See Annotation, 116 L.Ed.2d 1045 (2006) which collects and discusses the recent cases of the Supreme Court which have analyzed the construction and application of *Fed. R. Civ. Proc. 60(b)*.

> (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment.

[Emphasis added.]

The Respondent did not file a motion pursuant to any provision of *Fed. R. Civ. Proc. 60(b)* and the district court did not, at any time, grant *sua sponte* an order vacating the dismissal for fraud or for any other reason, and thereafter have the clerk of the court enter the written order. (Docket, App. 26-41)

After the on-the-record settlement of the Respondent's ADA claims on March 12, 2004 (App. 26, DE 36) and the dismissal on March 24, 2004 (App. 26, 37) the Respondent's remedy was the enforcement of the terms of the May 10, 2004 written settlement agreement between the parties (App. 18) by an action brought in state court. ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994).

The Respondent could not reopen the litigation to renegotiate the terms of the executed settlement agreement. To the contrary, the Respondent, as well as the Petitioners, was bound by the terms of contractual agreement which the district court lacked the power to modify or enforce. ***Ibid.***

Thus, the Petitioners request the Court grant this petition and overrule the express holding by the Ninth Circuit in ***Delil***, that the district court had the inherent power to allow the Respondent to simply certify " . . . that a settlement of all aspects of the

lawsuit have (sic) not occurred" and the dismissal with prejudice would be vacated without further order of the district court.

As noted previously, the dismissal entered on March 24, 2004 (App. 16) was never vacated by a separate order as required by *Fed. R. Civ. Proc. 58(a)* or entered on the docket in accordance with *Fed R. Civ. Proc. 79(a)*. (App. 26-41) Therefore, the district court upon the entry of the dismissal with prejudice on March 24, 2004 lost subject matter jurisdiction to affect the rights of the parties thereafter (***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994)) and the power to grant the Respondent an award of statutory attorney's fees, regardless of when the dismissal became final. ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598, 604 n. 7 (2001).

Moreover, the district court, contrary to the holding in ***Delil***, did not have jurisdiction to enter a subsequent dismissal with prejudice pursuant to *Fed. R. Civ. Proc. 41(a)(1)(ii)* on July 19, 2004 that incorporated the settlement agreement by reference in accordance with the terms of the subsequent stipulation. (App. 17-20)

Unless the district court entered a separate order pursuant to *Rule 58(a)* which vacates and sets aside the order of March 24, 2004 (App. 16), the July 19, 2004 order could not resurrect the subject matter jurisdiction of the district court, which had been lost, to allow enforcement of the settlement agreement and thereby form the basis for the district court awarding

the Respondent attorney's fees. See ***Bender v. Williamsport Area Sch. Dist.***, 475 U.S. 534, 541 (1986); ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994). Since the district court did not have the jurisdiction to enter the subsequent dismissal incorporating the settlement agreement, the July 19, 2004 order (App. 17-20) could not serve as a basis for awarding statutory attorney fees to the Respondent. ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598, 604 n. 7 (2001).

Based on the authority discussed above the Court is requested to grant this petition and resolve the conflict between the holding in ***Delil*** and the applicable procedural rules and decisions cited herein.

C. Did the district court have the inherent power to circumvent the application of Civil Local Rule 54-6 for the Northern District of California and excuse the Respondent from complying with the 14 day provision of the local rule for filing her motion for attorney's fees? See *Bender v. Freed*, 436 F.3d 747 (7th Cir. 2006); *IPXL Holdings, LLC v. Amazon.Com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005); *Tancredi v. Metropolitan Life Ins. Co.*, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003).

The appellate court in ***Delil*** stated that: "In the face of its own agreement that attorney's fees be

negotiated or determined by the court, it is disingenuous for the Lodge to contend that Delil had a duty to file a separate and superfluous motion for fees by August 2, 2004." (App. 3)

The agreement referenced in the above quotation is the stipulation and order of July 19, 2004. (App. 17-20) There is nothing in the stipulation or order that referenced an open extension of time or waiver of the time limitations set forth in Civil Local Rule 54-6 for the Respondent to file her motion for attorney's fees. The stipulation and order clearly stated that if the attorney's fee issue could not be resolved by negotiation, the Respondent would be required to file a motion with the district court.

The parties had been negotiating the issue of the Respondent's request for attorney's fees since March 12, 2004. (App. 26, DE 36) The issue was very contentious and Respondent's counsel was reluctant to release his time records without a stipulation and order of the district court which was first obtained on or about April 6, 2004. (App. 27, DE 38) The parties could not make any headway in resolving the attorney's fee issue even after the settlement agreement was executed on May 10, 2004.[10] (App. 18) By the time the stipulation and order was signed by the district court on July 19, 2004 the parties had been

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[10] The settlement agreement is included in its entirety at pages 25-46 of the Excerpts of Record on Appeal.

negotiating the issue of attorney's fees for over four (4) months without any progress. (App. 17-20)

The relevant language of the stipulation and order of July 19, 2004 is set forth below.

The stipulation part of the order recited *inter alia* that the parties had settled the damages and injunctive part of the case by May 10, 2004, " . . . which leaves the attorneys' fees, litigation expenses, and costs aspects of the Lawsuit for resolution by negotiation or subsequent motion to the Court." (App. 18)

The following language was used in the order section of the document:

> The attorneys' fees, litigation expenses, and costs aspects of the Lawsuit shall be resolved by negotiation or, if unsuccessful, by a subsequent motion to the Court.
>
> The Court shall retain jurisdiction to interpret and enforce the terms of the "Mutual Release and Settlement Agreement For Injunctive Relief and Damages Only" incorporated by reference herein and to render a decision on any motion made to the Court for attorneys' fees, litigation expenses, and costs. (App. 20)

The decision in ***Delil*** focused on the language in the order which stated that the district court " . . . would retain jurisdiction . . . to render a decision on any motion made to the [c]ourt for attorneys' fees, litigation expenses, and costs." (App. 3)

The prior decisions of this Court in ***White v. New Hampshire Dept. of Employment Security***, 45 U.S. 445, 451 (1982) and ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 200 (1988) concluded that a motion for attorney's fees is collateral to and separate from the decision on the merits. Furthermore, where the fee claim is based upon a fee-shifting statute, as in this case, the district court must wait until the merits of the case have been decided before it can make a determination regarding the "prevailing party." ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598 (2001).

Consequently, the district court in ***Delil*** could not entertain the Respondent's motion for attorney's fees until the merits of the case were decided. *Fed. R. Civ. Proc. 54(d)(2).* Moreover, until the district court incorporated the settlement agreement into its order on July 19, 2004 (App. 20) it had no statutory authority to award any attorney's fees to the Respondent as the "prevailing party." The district court was required to retain jurisdiction to enforce the terms of the settlement agreement because of the holding in ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994) before the Respondent could be considered the "prevailing party" as required by *42 U.S.C. § 12205*, pursuant to the holding in ***Buckhannon Board and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.***, 532 U.S. 598, 604 n. 7 (2001).

Therefore, the use of the term "retain jurisdiction . . . to render a decision on any motion for attorneys' fees . . . " (App. 20) did nothing more than affirm that the district court had jurisdiction pursuant to the holdings in ***Kokkonen*** and ***Buckhannon*** to hear a motion for attorney's fees brought pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure.*

There was no language used in either the stipulation or order of July 19, 2004 that referred to when the Respondent was required to file her motion for attorney's fees. Furthermore, there was no language used in the order which could be construed as waiving the applicability of the time requirements of Civil Local Rule 54-6. (App. 17-20) To the contrary, the order was silent as to when the Respondent had to file her motion for attorney's fees.

Both the district court in its order awarding fees (App. 4-15) and the appellate court in its decision (App. 1-3) held basically that there was simply no time limitation placed upon the Respondent as to when she had to file her motion for attorney's fees. Compare the holdings in ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006) **and** ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005) with rationale in the order of the district court and decision of the appellate in ***Delil***. (App. 1-15)

The last sentence of the appellate decision in ***Delil*** is both puzzling and confusing. As noted above, the decision states that "it is disingenuous for the Lodge to contend that Delil had a duty to file a **separate** and

superfluous motion for fees by August 2, 2004." (App. 3) [Emphasis added.]

The puzzling part of the sentence is the use of the words "separate" and "motion" and the date August 2, 2004. The date of August 2, 2004 is 14 days after the entry of the stipulation and order dismissing the action. (App. 17, 30, DE 54) Since the Respondent had not filed any previous motion for fees, (Docket, App. 24-41) the decision does not explain why the Respondent did not have a duty to file a "separate" motion for attorney's fees within the 14 day time limit established by the Civil Local Rule 54-6. See ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006). Nor, does the appellate court explain why a separate motion for attorney's fees was superfluous, i.e., unnecessary, considering *Fed. R. Civ. Proc. 54(d)(2)(B)*, as well as the local Rule, requires the filing of a motion. Hence, a separate motion for fees was required by the rules.

The fact that the parties stipulated to negotiate further could not relieve the Respondent of her "duty" to comply with Civil Rule 54-6. The Rule clearly states that: "Unless otherwise **ordered by the Court after a stipulation to enlarge time** under Civil L.R. 6-2 or a motion under Civil L.R. 6-3 motions for awards of attorney's fees by the court **must be served and filed within 14 days** of entry of judgment. . . ." [Emphasis added.] ***Ibid.***

The July 19, 2004 stipulation and order (App. 17-20) did not contain any specific stipulation or order to

enlarge the time to file the fee motion as required by Civil Local Rule 54-6. Therefore, according to the local Rule, the Respondent, after the entry of the order on July 19, 2004 (App. 30, DE 54), had to do something to enlarge the time to file her motion, or file the motion within 14 days of the entry of the order, or resolve the fee dispute within the 14 days. As noted previously, the Respondent did not file her motion for attorney's fees until November 23, 2004, eight (8) months after the entry of the March 24, 2004 dismissal and four (4) months after the stipulation and order dismissing the case on July 19, 2004. (App. 31, DE 58)

Numerous decisions have held that: "Rules of practice adopted by the United States District Courts . . . have the force and affect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." ***Woods Construction Co., Inc. v. Atlas Chemical Industries, Inc.***, 337 F.2d 888, 890 (10th Cir. 1964), citing ***Weil v. Neary,*** 268 U.S. 160, 169 (1929). The district court was required to follow the local rules and could not use its supervisory powers to circumvent the clear mandate of the local procedural rules. See ***Bank of Nova Scotia v. United States***, 487 U.S. 250, 254-255 (1988). The decision in ***Delil*** and the order of the district court awarding attorney's fees which sanctioned the untimely filing of the Respondent's motion is contrary to the published

opinions in the Second, Sixth, Seventh, Eleventh, and Federal Circuits.[11]

The holding in ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006) is instructive, especially considering the appellate court's comments with regard to the parties' knowledge that a fees motion would be filed by the "prevailing party."

In ***Bender***, the real party in interest was an ERISA "Plan." In the underlying litigation the Plan had moved for summary judgment against Bender and requested attorney's fees pursuant to *29 U.S.C. § 1132(g)*. The district court granted the motion for summary judgment but denied the request for attorney's fees at that time. The final judgment on the reimbursement claim was entered on August 24, 2004. Thirty-four days later on September 27, 2004 the Plan filed its second motion seeking attorney's fees from Bender pursuant to *§ 1132(g)*. The district court denied the motion for attorney's fees as untimely pursuant to *Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure*. ***Id.*** at 436 F.3d at 749.

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[11] The following are some of the relevant cases of the Courts of Appeals: ***Weyant v. Okst***, 198 F.2d 211 (2d Cir. 1999); ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003); ***Allen v. Murph***, 194 F.3d 722 (6th Cir. 1999); ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006); ***Quick v. Peoples Bank of Cullman County***, 993 F.2d 793 (11th Cir. 1993); ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005); see ***Port of Stockton v. Western Bulk Carriers***, 371 F.3d 1119 (9th Cir. 2004).

On appeal the Plan did not explain why it failed to file its motion within the 14 day time period required by *Rule 54(d)(2)(B)*. Instead the Plan insisted that the

> district court should have considered it anyway, because "all the parties were well aware of the Plan's intention to file a motion for attorney's fees long before the entry of judgment," and discussion during telephonic pretrial conference "left no room for doubt that the Motion would be filed post-judgment." **This is not a legal argument**; it is an appeal to fairness based upon an absence of prejudice, without a corresponding claim that compliance with the deadline imposed by *Rule 54(d)(2)* was impossible or impracticable or that the Plan's noncompliance was for some reason excusable. We are not persuaded. The Plan missed the deadline under *Rule 54(d)(2)* and offers no reason for having done so. **The fact that the parties "were aware" that the Plan intended to file a fees motion at some indeterminable date in the future does not excuse noncompliance with the procedural rules.** ***Id.*** at 436 F.3d 750. [Emphasis added.]

The rationale of the Plan in ***Bender*** is essentially the rationale set forth in the decision of the appellate court in ***Delil*** which the Seventh Circuit found unpersuasive. It must be noted that the filing of the motion to extend the time to file for fees is no more superfluous than the filing of a motion to extend time to file a motion for a new trial or for a notice of

appeal. As this Court has noted on many occasions, the jurisdiction of the federal courts is granted by the Constitution or by statute, and not by the stipulation of the parties, or an individual court's opinion that a motion to enlarge time pursuant to the applicable procedural rules would be superfluous.

As in ***Bender***, the Respondent has offered no explanation for her waiting an additional four months after the July 19, 2004 order (App. 17-20) to file her motion for attorney's fees, and the appellate decision in ***Delil*** is unquestionably at odds with the decisions in ***Bender v. Freed***, 436 F.3d 747 (7th Cir. 2006); ***IPXL Holdings, LLC v. Amazon.Com, Inc.***, 430 F.3d 1377 (Fed. Cir. 2005); ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2d Cir. 2004), *cert. denied*, 539 U.S. 942 (2003).

CONCLUSION

The *Federal Rules of Civil Procedure* were established, in part, to provide a mechanism to ensure the accuracy and clarity of the district court record so that the appellate courts could rely upon the district court docket with some assurance that the orders and judgments brought before them on appeal were final as defined *28 U.S.C. § 1291*. The requirement that a judgment or amendment to the judgment be set forth in a separate document and entered on the docket of the district court as provided by *Rules 58(a)* and *79(a)* of the *Federal Rules of Civil Procedure,* which has

been extended to orders as well, are essential elements in guaranteeing the accuracy, clarity, and finality of the events that occurred in the district court.

This Petition for Certiorari presents the Court with the opportunity to resolve the important procedural issue concerning the mechanisms necessary for vacating an order of dismissal entered on the docket of the district court, as well as resolve a conflict between the Ninth Circuit and the other Circuits as to whether the record must reflect that a fee applicant either filed a motion for fees in compliance with *Rule 54(d)(2)* of the *Federal Rules of Civil Procedure* or obtained an enlargement of time in accordance with the applicable federal or local rules.

For the reasons stated herein the Petitioners respectfully request that the Court grant this petition and reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLYNN DELIL, Plaintiff-Appellee, v. POINT REYES SEASHORE LODGE; et al., Defendants-Appellants.	No. 05-16781 D.C. No. CV-03-00010-SI MEMORANDUM* (Filed Nov. 16, 2007)

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted November 5, 2007
San Francisco, California

Before: NOONAN and McKEOWN, Circuit Judges, and TRAGER**, Senior Judge.

Point Reyes Seashore Lodge, Jeffrey S. Harriman, and Thomas R. Harriman (collectively, the "Lodge") appeal the district court's award of attorney's fees to Hollynn Delil ("Delil"). The parties are familiar with the facts. We proceed to the law.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by designation.

Subject Matter Jurisdiction

The district court preserved jurisdiction following the March 24, 2004 Order of Dismissal Upon Settlement (the "March 2004 Order"). The Lodge's argument that the March 2004 Order was unconditional is unpersuasive. When Delil certified that not all aspects of the lawsuit had settled, the order was automatically vacated.

The Lodge's reliance on *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375 (1994), and *Hagestad v. Tragesar,* 49 F.3d 1430 (9th Cir. 1995), is misplaced. *Kokkonen* did not involve a conditional order and has no application to this case. In *Hagestad,* the condition for vacating the dismissal order was never met; the 90-day deadline had passed when the court attempted to reassert jurisdiction. It, too, is inapposite.

The July 2004 Stipulation and Order

The Lodge tries a second shot, equally unpersuasive: Delil did not move for fees within 14 days of the entry of the Stipulation and Order for Dismissal of the Injunctive Relief and Damages Aspects of the Lawsuit, filed on July 19, 2004. As this document recites the parties' agreement that they will "leave [ ] the attorneys' fees, litigation expenses, and costs aspects of the [l]awsuit for resolution by negotiation or subsequent motion of the court," the Lodge's attempt to back out of this agreement now is totally at odds with the parties' understanding. The court

stated as part of the same stipulation and order that it would "retain jurisdiction to interpret and to enforce the terms of the [settlement agreement] and to render a decision on any motion made to the [c]ourt for attorneys' fees, litigation expenses, and costs."

In the face of its own agreement that attorneys' fees be negotiated or be determined by the court, it is disingenuous for the Lodge to contend that Delil had a duty to file a separate and superfluous motion for fees by August 2, 2004.

For the reasons stated, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL,

Plaintiff,

v.

POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; and THOMAS R. HARRIMAN,

Defendants. /

No. C 03-00010 SI

ORDER AWARDING ATTORNEYS' FEES AND COSTS

(Filed Aug. 9, 2005)

Currently pending is plaintiff's motion for attorneys' fees and costs. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby GRANTS IN PART plaintiff's motion and awards fees and costs as set out below.

BACKGROUND

Plaintiff Hollynn Delil[1] is physically disabled and requires the use of a wheelchair. Plaintiff visited the

[1] Plaintiff brings this action under the name "Hollynn Delil." *See* Delil Declaration. However, plaintiff also uses the name "HolLynn D'Lil." *See* Delil Decl., Ex. 1 (providing copy of plaintiff's resume). Defendants also present evidence that plaintiff has filed lawsuits under both names. *See* Brown Decl., Exs. D, E. Plaintiff provides no explanation for the variety of names used, even within her own declaration.

Point Reyes Seashore Lodge in Fall 2001.[2] After this visit, plaintiff wrote a letter to defendants detailing alleged disability access barriers. Defendants responded to the letter, and made some of the changes suggested by plaintiff. Plaintiff returned to the lodge on August 20, 2002. Plaintiff was not satisfied by the disability access provided by defendants and the parties again exchanged letters. Plaintiff then filed suit in this Court in January 2003, alleging violations of the Americans with Disabilities Act and the various California codes. Plaintiff requested injunctive relief, damages, and fees and costs.

The parties conducted some discovery and extensive settlement negotiations. No dispositive motions were filed by the parties and the Court dismissed the case on March 24, 2004, after the parties reached a settlement. The parties were unable to agree on the issue of attorneys' fees and costs, leaving plaintiff to file the current motion.

DISCUSSION

1. Attorneys' fees

Plaintiff's motion for attorneys' fees and costs is brought under both federal and state law. The federal authority to award attorneys' fees is derived in part from Section 505 of the ADA, which provides that "in

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[2] The Point Reyes Seashore Lodge is a 23 room lodge in Olema, California. Construction began on the lodge in 1987.

any action or administrative proceeding commenced pursuant to [the ADA], the court or agency, in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. Plaintiffs are entitled to fees under the ADA using the "lodestar" measure of fees, which is obtained by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. *See Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir. 1987) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933 (1983)). In evaluating what is a reasonable number of hours, the Court must review detailed time records to determine whether the hours claimed by the applicant were unnecessary, duplicative or excessive. *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied, amended on other grounds,* 808 F.2d 1373 (9th Cir. 1987).

Plaintiff is also entitled to attorneys' fees as the prevailing party under California law. Under California Code of Civil Procedure § 1021.5, plaintiff is entitled to attorneys' fees for enforcing "an important right affecting the public interest," if a "significant benefit ... has been conferred on the general public or a large class of persons." Providing access to disabled individuals constitutes an important right affecting the public interest. California Government Code § 19230. State law also establishes the lodestar method as the proper method of calculation. *Crommie v. State of California,* 840 F.Supp. 719, 724-25 (N.D. Cal. 1994).

Plaintiff requests an award of fees in the amount of $186,800 and costs of $14,300. Plaintiff also requests an 2.0 multiplier to the lodestar amount, creating a total requested award for attorneys' fees and costs of $387,500.

A. Plaintiff is entitled to attorneys' fees as the prevailing party

Defendants dispute plaintiff's entitlement to attorneys' fees under the ADA and the California "private attorney general" statute, claiming that plaintiff did not file her motion for fees in a timely fashion. Defendants argue that the Court's July 19, 2004 Order dismissing the case under Federal Rule of Civil Procedure 41(a)(1)(ii) was a final judgment or order. Defendants assert that plaintiff then had 14 days after the Court's July 2004 Order to file her motion for attorneys' fees under Federal Rule of Civil Procedure 54(d)(2). However, plaintiff's motion was not filed until November 23, 2004. Therefore, defendants argue that plaintiff failed to comply with the timeliness requirements of Rule 54(d) and should not receive an award of fees.

Even if Rule 54 applies to the circumstances of this case, the Court finds that plaintiff's motion was timely. The rule provides that the motion for fees must be filed within 14 days of entry of judgment, "unless otherwise provided by statute or order of the court." The Court's Order of July 19, 2004 stated that it would retain jurisdiction over rendering a decision

on any fees motion. The Order also stated that the parties were to resolve the fees issue by negotiation if possible. Finally, the Court's August 25, 2004 Order stated that plaintiff could seek fees and costs through "a regularly scheduled motion."

The Court finds that the August 25, 2004 Order provided that plaintiff was not required to file her motion for attorneys' fees and costs within 14 days of the stipulated dismissal, given that the Order was issued more than one month after the dismissal order.

Defendants also argue that plaintiff is not entitled to fees because she did not make a reasonable attempt to settle the dispute prior to litigation. Defendants assert that plaintiff must engage in a reasonable attempt to settle her dispute prior to litigation, under *Graham v. Daimler Chrysler Corp.*, 34 Cal.4th 553 (2004). However, *Graham* establishes this requirement only for plaintiffs asserting the "catalyst" theory for recovery of fees under CCP § 1021.5. The catalyst theory allows for the recovery of attorney fees "even when the litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." *Id.* at 560.

The catalyst theory does not apply in this case, as plaintiff obtained a judicially enforceable settlement that included monetary damages and injunctive relief against defendants. Therefore, plaintiff has a basis for claiming to be the "prevailing party" other than

"[her] being the catalyst of policy change." *Barrios v. California Interscholastic Federation,* 277 F.3d 1128, 1134 n. 5 (9th Cir. 2002). Instead, the settlement agreement establishes a "legally enforceable instrument" that makes her the "prevailing party." *Id.*; *see also Richard S. v. Department of Developmental Services,* 317 F.3d 1080, 1087 (9th Cir. 2003). Therefore, the Court finds that plaintiff is entitled to attorneys' fees as the prevailing party in this action.

B. Hourly rate

Plaintiff requests the following hourly rates for counsel: $420[3] for Sidney Cohen; $395 for Paul Rein; and $345 for Patricia Barbosa. Plaintiff also requests $125 an hour for paralegal Scott Holmes. In support of her motion, plaintiff submits substantial evidence that the claimed fees are reasonable given the education, skill and experience of counsel, the amount they normally charge for their legal services and the market rate for attorneys of comparable skill and experience. *See* Cohen Decl. at ¶ 29; Rein Decl. at ¶ 38; Barbosa Decl. at ¶ 6-11; Pearl Decl. at 11. Defendants present no evidence that counsel's rates are unreasonable. Therefore, the Court finds that the hourly rates are reasonable.

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[3] This rate applies to work performed by Cohen in 2003-2005. Cohen's hourly rate in 2002 was $390, and he requests fees based on that rate for work performed in 2002.

C. Reasonable hours expended

Plaintiff request an award compensating counsel for over 450 hours of attorney and paralegal time and assert that this time was reasonably spent on litigation. Defendants argue that the results could have been achieved with significantly less work and request a drastic reduction in the number of hours factored into the lodestar.

i. Rein and Barbosa

Plaintiff seeks payment for over 80 hours of time spent by attorneys Rein and Barbosa. Defendants argue that it was excessive for three lawyers to represent plaintiff in this matter. The Court agrees. The case was a typical ADA case that did not involve unique factual or legal issues. Plaintiff is well-versed in the state and federal disability provisions and identified a number of violations in her multiple visits to the premises. Therefore, liability was not in question during the litigation. Instead, the litigation consisted of a prolonged settlement negotiation. This is demonstrated by the fact that the parties did not file a single substantive motion with the Court.

Given this set of circumstances, it was unnecessary for Cohen to include additional attorneys in the case. Cohen justifies his high hourly rate by citing his skills and experience in ADA cases. If Cohen is an attorney worthy of such an hourly rate, then he should not require the assistance of additional attorneys to handle such a straightforward case. In reviewing the

time sheets submitted by Paul Rein, the Court finds that many of the entries consist of telephone calls with co-counsel Cohen. In other entries, Rein reviews documents created by Cohen. Many of the tasks listed by Rein in his declaration demonstrate the repetitive nature of his involvement. These tasks include countless references to "reviewing" the various documents in the case. Rein Decl. at ¶ 6. Rein also gives a [sic] various descriptions to essentially the same activity – talking with Cohen – such as: "meetings, braintrusting, [and] consulting with co-counsel"; "consultation" re: various topics; and "calls . . . with co-counsel."

Given the straightforward nature of this case, the Court finds it was unnecessary for a well-qualified, highly compensated lawyer such as Cohen to need another attorney to "consult" and or "brainstorm" with. Cohen is requesting compensation for over 350 hours of his own time on this case, which the Court finds is more than sufficient to obtain the results in this case. Therefore, the Court will not award fees based on the time submitted for Paul Rein, which the Court finds was unnecessary.

For the same reasons, the Court will not award attorneys' fees for the time of Patricia Barbosa.[4]

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[4] Most of Barbosa's time entries also consist of "conferences" with co-counsel.

ii. Cohen

Sidney Cohen served as lead counsel and requests an award for over 350 hours of his time spent litigating the case. Defendants argue that plaintiff should not receive an award for fees after July 22, 2003 because "all legitimate issues were resolved" on that date. However, this statement is incorrect. As of July 2003, several issues remained that were not resolved until the Settlement Agreement, including a lift for the breakfast area, handrails, and a pathway to the Casa Olema Area. *Compare* Brown Decl., Ex. O *with* Cohen Decl., Ex. 2. Therefore, the Court finds that it is proper to award fees for work performed after July 22, 2003.

Plaintiff produced the handwritten time sheets compiled by Cohen during the course of the litigation, which the Court has reviewed. *See* Cohen Decl., Ex. 3; Cohen Reply Decl., Ex. 1; and Supp. Cohen Decl., Ex. 1. The Court finds that the hours documented by Cohen are, although generous, not unreasonable. Defendants presented a thorough, painstaking and often contentious defense, which required the parties to engage in multiple mediations and other settlement negotiations and substantially extended the time required to complete the case. Therefore, the Court will award attorneys' fees for Cohen based on 367 hours reasonably expended on litigation.

2. Multiplier

Plaintiff also requests a multiplier of 2.0 to the lodestar amount because of the results obtained, the importance of the case, and the contingent nature of plaintiff's fees. Although federal law does not permit an enhancement to the lodestar based on contingent risk, California law, by contrast, permits such enhancements under state fee-shifting statutes. *See, Ketchum v. Moses,* 24 Cal.4th 1122, 1136-37 (2001); *Serrano v. Priest,* 20 Cal.3d 25 (1977). The Ninth Circuit has held that where plaintiffs succeed on both federal and state statutory grounds, it is appropriate to enhance the lodestar fee with a multiple based on state law. *Mangold v. California Public Utilities Commission,* 67 F.3d 1470, 1478 (9th Cir. 1995). In addition to contingent risk, California law also allows courts to consider the results obtained and the importance of the case to plaintiff and the public when determining if an enhancement to the lodestar amount is appropriate. *Serrano,* 20 Cal.3d at 48-49.

The Court finds that an enhancement to the lodestar amount is not appropriate in this instance. As described above, this was a straightforward disability case that did not require exceptional work on the part of plaintiff's counsel to obtain the Settlement Agreement reached by the parties. Liability was not in question in this case.[5] Plaintiff and her counsel

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[5] Plaintiff does not identify any contingent risk involved in the case, aside from stating that "[a]ll cases, no matter how

(Continued on following page)

are well-versed in disability law and repeat players in disability litigation. There were no substantive motions filed, nor were there any novel legal issues. Therefore, the Court finds that plaintiff should not receive an enhancement on the lodestar amount.

3. Costs

Plaintiff requests an award of $13,904 for costs incurred by attorney Cohen during litigation (see Cohen Decl., Ex. 5), and $396 for costs incurred by attorney Rein. The Court will not award costs for Rein, as he presents no documentation in support of them. Defendants challenge the fees paid by Cohen for plaintiff's expert, claiming that all work after July 2003 was unnecessary. As described above, the Court finds that plaintiff should receive compensation for fees and costs incurred after July 2003. Defendants also challenge plaintiff's use of a courier service to deliver documents to defense counsel. The Court finds that the use of a courier service is appropriate and compensable. Therefore, the Court awards $13,904 in Cohen's costs.

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strong on the merits, run the risk of losing." Pl.'s Mot. at 22. The Court finds this is not sufficient to warrant an enhancement.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART plaintiff's motion for attorneys' fees and costs:

1) Attorneys' Fees for Sidney Cohen in the amount of $154,975:

   - 2002: 14.1667 hours x $390/hour = $5,525
   - 2003-05: 352 hours x $420/hour = $149,450

2) Costs in the amount of $13,904

[Docket # 58]

IT IS SO ORDERED.

Dated: August 9, 2005

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL,

Plaintiff,

v.

PT REYES SEASHORE LODGE,

Defendants. /

No. C 03-00010 SI

ORDER OF DISMISSAL UPON SETTLEMENT

(Filed Mar. 24, 2004)

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, that if any party hereto certifies to this court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

Dated: 3/23/04

s/ Susan Illston
SUSAN ILLSTON
United States District Judge

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Attorneys for Plaintiff
HOLLYNN DELIL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL

Plaintiff,

v.

POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN; and DOES 1-25, Inclusive,

Defendants.

/

CASE NO.
C 03 0010 SI EMC

Civil Rights

STIPULATION AND ORDER [PROPOSED] FOR DISMISSAL OF THE INJUNCTIVE RELIEF AND DAMAGES ASPECTS OF THE LAWSUIT

(Filed Jul. 19, 2004)

Plaintiff HOLLYNN DELIL, by and through her attorneys of record, file this Stipulation of Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii).

Plaintiff filed this lawsuit on January 2, 2003.

Plaintiff HOLLYNN DELIL and Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN have entered into a "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" which was signed by Plaintiff on April 30, 2004 and by Defendants on May 10, 2004 and which settles the injunctive relief and damages aspects of the Lawsuit against all Defendants and which leaves the attorneys' fees, litigation expenses, and costs aspects of the Lawsuit for resolution by negotiation or subsequent motion to the Court. A copy of the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" is incorporated by reference herein as if set forth in full. Plaintiff HOLLYNN DELIL and Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN stipulate to the Court retaining jurisdiction to interpret and to enforce the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only."

Plaintiff HOLLYNN DELIL moves to dismiss the injunctive relief and damages aspects of the lawsuit with prejudice against Defendants POINT REYES,

SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN.

Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN, who have answered the complaint, agree to the dismissal of the injunctive relief and damages aspects of the Lawsuit with prejudice.

This case is not a class action, and no receiver has been appointed.

This Stipulation and Order may be signed in counterparts.

Wherefore, Plaintiff HOLLYNN DELIL and Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN, by and through their attorneys of record, so stipulate.

Date: 7/13/04

SIDNEY J. COHEN
PROFESSIONAL
CORPORATION
LAW OFFICES OF
PAUL L. REIN

/s/ Sidney J. Cohen
Sidney J. Cohen
Attorney for Plaintiff
Hollynn Delil

Date: 7/12/04

LAW OFFICES OF
MICHAEL E. BROWN

/s/ Michael E. Brown
Michael E. Brown, Esq.
Attorney for Defendants
Point Reyes Seashore
Lodge, Jeffrey F. Harriman,
and Thomas R. Harriman

PURSUANT TO STIPULATION OF THE PARTIES, IT IS SO ORDERED:

The injunctive relief and damages aspects of the Lawsuit against Defendants POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, and THOMAS R. HARRIMAN are dismissed with prejudice.

The attorneys' fees, litigation expenses, and costs aspects of the Lawsuit shall be resolved by negotiation or, if unsuccessful, by subsequent motion to the Court.

The Court shall retain jurisdiction to interpret and to enforce the terms of the "Mutual Release And Settlement Agreement For Injunctive Relief And Damages Only" incorporated by reference herein and to render a decision on any motion made to the Court for attorneys' fees, litigation expenses, and costs.

Date: 7/16/04

s/ Susan Illston
Susan Illston
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL,

Plaintiff,

v.

POINT REYES SEASHORE LODGE, et al.,

Defendants. /

No. C 03-0010 SI

ORDER

(Filed Aug. 26, 2004)

On July 6, 2004, defendants were ordered to show cause, in writing to be filed by July 16, 2004, why it did not appear at the case management conference held on July 2, 2004, and to respond in writing to plaintiff's proposal concerning attorneys' fees. Defendants have done neither, but the parties did submit, and on July 19, 2004 the Court signed, a Stipulation and Order for dismissal of the injunctive relief and damages aspects of the lawsuit.

Plaintiff now requests that the case be "reopened" and restored to calendar, in order that the fees issue may be resolved. However, since the substantive portions of the action have been dismissed by stipulation, the Court declines to restore the matter to the pending calendar. Rather, the Court orders that if plaintiff seeks to be awarded fees and costs, she may apply for same by a regularly noticed motion, which the Court will hear and decide.

If plaintiff files such a motion, and if defendants desire to oppose the motion in any respect,

then defendants shall, in the first portion of their brief in opposition, SHOW CAUSE why they failed to appear at the case management conference on July 2, 2004; why they failed to respond to plaintiff's proposal with respect to attorneys fees; why they did not comply with this Court's July 6, 2004 Order to Show Cause; and why they should not be sanctioned for all of the above.

IT IS SO ORDERED.

Dated: August 25, 2004 /s/ Susan Illston
SUSAN ILLSTON
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOLLYNN DELIL, Plaintiff-Appellee, v. POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN, Defendants-Appellants	No. 05-16781 D.C. No. CV-03-00010-SI Northern District of California, San Francisco ORDER (Dec. 14, 2007)

Before: NOONAN and McKEOWN, Circuit Judges, and TRAGER,*

The petition for rehearing is DENIED.

* The Honorable David G. Trager, Senior United States District Judge for the Eastern District of New York, sitting by designation.

ADRMOP, APPEAL, CLOSED, E-Filing, MEDTERM, REFSET-EMC, REOPEN

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:03-cv-00010-SI
Internal Use Only

Delil v. Point Reyes Seashore Lodge et al
Assigned to: Hon. Susan Illston
Demand: $0
Cause: 42:12101 American w/ Disabilities Act (ADA)

Date Filed: 01/02/2003
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Defendant

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ATTORNEY TO BE NOTICED

Michael E. Brown
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

* * *

03/15/2004	36	Minute Entry: Settlement Conference held 3/12/2004. Partial settlement reached; attorneys' fees remain unresolved. (Date Filed: 3/15/2004). (Court Reporter: N/A; FTR 031204 (1:10); FTR 031204 (4:46).) (emcsec, COURT STAFF) (Date Filed: 3/15/2004) (Entered: 03/15/2004)
03/24/2004	37	ORDER DISMISSING CASE, Signed by Judge Illston on 3/23/04. (ts, COURT STAFF) (filed on 3/24/2004) (Entered: 03/24/2004)

04/06/2004	38	STIPULATION *FOR REVIEW AND RETURN OF PLAINTIFF'S COUNSELS' TIME SHEETS AND BILLING STATEMENTS* by Hollynn Delil. (Cohen, Sidney) (Filed on4/6/2004) (Entered: 04/06/2004)
05/14/2004		Received Document Substitution of Attorney by Jeffrey F. Harriman, Thomas R. Harriman, Point Reyes Seashore Lodge. (ys. COURT STAFF) (Filed on 5/14/2004) (Entered: 05/17/2004)
05/17/2004	39	CLERK'S NOTICE re: Failure to E-File and/or Failure to Register as an E-Filer (substitution of attorney by defendants' counsel), (ys, COURT STAFF) (Filed on 5/17/2004) (Entered: 05/17/2004)
05/17/2004	40	MOTION to Substitute Attorney filed by Jeffrey F. Harriman. (Orlick, Martin) (filed on 5/17/2004) (Entered: 05/17/2004)
05/17/2004	42	ORDER granting defendants' substitution of attorney to Michael E. Brown, Esq.. Signed by Judge Susan Illston on 5/17/04. (ys, COURT STAFF) (Filed on 5/17/2004) (Entered: 05/18/2004)

05/17/2004		***Attorney Michael E. Brown for Point Reyes Seashore Lodge; Jeffrey F. Harriman and Thomas R. Harriman added, Attorney Martin H. Orlick terminated. (ys, COURT STAFF) (Filed on 5/17/2004) (Entered: 05/18/2004)
05/18/2004	41	STIPULATION AND ORDER for review and return of pltf. counsels' time sheets and billing statements. Signed by Judge Illston on 5/17/04. (ts, COURT STAFF) (Filed on 5/18/2004) (Entered: 05/18/2004)
05/18/2004		***Motions terminated: (ts, COURT STAFF) (Filed on 5/18/2004) (Entered: 05/18/2004)
05/19/2004	43	ORDER granting substitution of attorney. (Docket clerk to add counsel to docket sheet.). Signed by Judge Illston on 5/19/04. (ts, COURT STAFF) (Filed on 5/19/2004) (Entered: 05/19/2004)
05/19/2004		***Add/Terminate Attorney. (slh. COURT STAFF) (Filed on 5/19/2004) (Entered: 05/21/2004)
05/31/2004	44	STIPULATION *FOR REVIEW AND RETURN OF PLAINTIFF'S COUNSELS' TIME SHEETS AND BILLING STATEMENTS* by Hollynn Delil. (Cohen, Sidney) (Filed on 5/31/2004) (Entered: 05/31/2004)

06/03/2004	45	CERTIFICATE of Counsel *That Settlement Of All Aspects Of the Lawsuit Have Not Occurred and Proof Of Service* by Sidney J. Cohen on behalf of Hollynn Delil (Cohen, Sidney) (Filed on 6/3/2004) (Entered: 06/03/2004)
06/09/2004	46	CLERK'S NOTICE reopening case and setting conference to occur on 7/2/04 @ 2:30 p.m. (ts, COURT STAFF) (Filed on 6/9/2004) (Entered: 06/09/2004)
06/09/2004		***Case Reopened (ts, COURT STAFF) (Filed on 6/9/2004) (Entered: 06/09/2004)
06/09/2004		Set Deadlines/Hearings: Case Management Conference set for 7/2/2004 02:30 PM. (ys, COURT STAFF) (Filed on 6/9/2004) (Entered: 06/10/2004)
06/16/2004	47	MOTION to Substitute Attorney filed by Jeffrey F. Harriman. (Brown, Michael) (Filed on 6/16/2004) (Entered: 06/16/2004)
06/16/2004	48	MOTION to Substitute Attorney filed by Thomas R. Harriman. (Brown, Michael) (Filed on 6/16/2004) (Entered: 06/16/2004)
06/17/2004	49	JOINT CASE MANAGEMENT STATEMENT (*UPDATED*) filed by Hollynn Delil. (Cohen, Sidney) (Filed on 6/17/2004) (Entered: 06/17/2004)

06/22/2004	50	ORDER granting substitution (Harriman). Signed by Judge Illston on 6/21/04. (ts, COURT STAFF) (Filed on 6/22/2004) (Entered: 06/22/2004)
06/22/2004		***Motions terminated: 47 MOTION to Substitute Attorney filed by Jeffrey F. Harriman, 48 MOTION to Substitute Attorney filed by Thomas R. Harriman. (ys, COURT STAFF) (Filed on 6/22/2004) (Entered: 06/23/2004)
07/06/2004	51	Minute Entry: Further Case Management Conference held on 7/2/2004 before Illston (Date Filed: 7/6/2004). (Court Reporter none.) (ts, COURT STAFF) (Date Filed: 7/6/2004) (Entered: 07/06/2004)
07/06/2004	52	ORDER to Show Cause, Signed by Judge Illston on 7/6/04. (ts, COURT STAFF) (Filed on 7/6/2004) (Entered: 07/06/2004)
07/13/2004	53	Proposed Order *STIPULATION AND ORDER [PROPOSED] FOR DISMISSAL OF THE INJUNCTIVE RELIEF AND DAMAGES ASPECTS OF THE LAWSUIT* by Hollynn Delil. (Cohen, Sidney) (Filed on 7/13/2004) (Entered: 07/13/2004)
07/19/2004	54	ORDER DISMISSING CASE, Signed by Judge Illston on 7/16/04. (ts, COURT STAFF) (Filed on 7/19/2004) (Entered: 07/19/2004)

07/22/2004	55	RESPONSE TO ORDER TO SHOW CAUSE by Hollynn Delil. (Cohen, Sidney) (Filed on 7/22/2004) (Entered: 07/22/2004)
08/12/2004	56	CERTIFICATION THAT SETTLEMENT OF ALL ASPECTS OF THE LAWSUIT HAVE NOT OCCURRED, REQUEST TO RE-OPEN THE CASE, AND REQUEST FOR THE COURT TO FOLLOW UP ON ITS JULY 6, 2004 ORDER TO SHOW CAUSE TO DEFENDANTS by Sidney J. Cohen on behalf of Hollynn Delil (Cohen, Sidney) (Filed on 8/12/2004) Modified on 8/13/2004 (ys, COURT STAFF). (Entered: 08/12/2004)
08/26/2004	57	ORDER re request that the case be "re-opened." Signed by Judge Susan Illston on 8/25/04. (rbc, COURT STAFF) (Filed on 8/26/2004) (Entered: 08/26/2004)
11/23/2004	58	PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND [sic] AND CERTIFICATE OF SERVICE THEREON filed by Hollynn Delil. Motion Hearing set for 1/28/2005 09:00 AM. (Cohen, Sidney) (Filed on 11/23/2004) Modified on 11/24/2004 (ys, COURT STAFF). (Entered: 11/23/2004)

11/30/2004	59	CLERK'S NOTICE Continuing Motion hearing to 2/4/05 (ts, COURT STAFF) (Filed on 11/30/2004) (Entered: 11/30/2004)
11/30/2004		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 2/4/2005 09:00 AM. (ys, COURT STAFF) (Filed on 11/30/2004) (Entered: 12/01/2004)*
12/13/2004	60	First MOTION to Continue *by Stipulation the Hearing on 58 Plaintiff's Motion for Attorney's Fees and Costs* filed by Point Reyes Seashore Lodge. Motion Hearing set for 2/4/2005 09:00 AM. (Brown, Michael) (Filed on 12/13/2004) Modified on 12/14/2004 (ys, COURT STAFF). (Entered: 12/13/2004)
12/13/2004	61	STIPULATION *to Continue Hearing on 58 Plaintiff's Motion for an Award of Attorney's Fees and Costs* by Point Reyes Seashore Lodge. (Brown, Michael) (Filed on 12/13/2004) Modified on 12/14/2004 (ys, COURT STAFF). (Entered: 12/13/2004)

12/21/2004	62	ORDER continuing motion. Signed by Judge Illston on 12/17/04. (ts, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/21/2004)
12/21/2004		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *and CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 3/4/2005 09:00 AM. (ys, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/22/2004)*
12/21/2004		***Motions terminated: (ys, COURT STAFF) (Filed on 12/21/2004) (Entered: 12/22/2004)
01/27/2005	63	Plaintiff's Memorandum Of Points And Authorities In 58 Support Of An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants ... filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 64 Declaration of Sidney J. Cohen *In Support Of 58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants* . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 65 Declaration of Paul L. Rein *In Support of 58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants* . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 66 Declaration of Patricia Barbosa *In Support Of 58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs Against Defendants* . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 67 Proposed Order *Grantin* [sic] *58 Plaintiff's Motion For An Award Of Attorney Fees, Litigation Expenses, And Costs* by Hollynn Delil. (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005 (ys, COURT STAFF). (Entered: 01/27/2005)

01/27/2005 68 CERTIFICATE OF SERVICE of 63, 64, 65, 66, 67 by Hollynn Delil (Cohen, Sidney) (Filed on 1/27/2005) Modified on 1/28/2005) (ys, COURT STAFF). (Entered: 01/27/2005)

02/08/2005 69 Second Ex Parte Application *Of Defendants To Continue Hearing on Plaintiff's Motion for Attorney's Fees and Costs* filed by Point Reyes Seashore Lodge. Motion Hearing set for 3/4/2005 09:00 AM. (Brown, Michael) (Filed on 2/8/2005) (Entered: 02/08/2005)

02/09/2005 70 Plaintiff's Opposition To 60 Defendants' Motion To Continue March 4, 2005 Hearing Date filed by Hollynn Delil. (Cohen, Sidney) (Filed on 2/9/2005) Modified on 2/10/2005 (ys, COURT STAFF). (Entered: 02/09/2005)

02/15/2005 71 ORDER by Judge Illston granting 69 Ex Parte Application; motion for fees continued to 3/25/05 @ 9 a.m. (ts, COURT STAFF) (Filed on 2/15/2005) (Entered: 02/15/2005)

02/15/2005		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 3/25/2005 09:00 AM. (ys, COURT STAFF) (Filed on 2/15/2005) (Entered: 02/16/2005)*
02/22/2005	72	CERTIFICATE OF SERVICE of [73], [74], [75], [76] by Point Reyes Seashore Lodge (Brown, Michael) (Filed on 2/22/2005) Modified on 2/23/2005 (ys, COURT STAFF). (Entered: 02/22/2005)
02/22/2005	73	Points and Authorities in Opposition re 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
02/22/2005	74	Declaration of Kim R. Blackseth in Support of 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)

02/22/2005	75	DECLARATION of Jeffrey E. Harriman in Opposition to 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
02/22/2005	76	DECLARATION of Michael E. Brown in Opposition to 58 MOTION for Attorney Fees filed by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman. (Related document(s) 58) (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
02/22/2005	77	CLERK'S NOTICE re: Failure to E-File (Points and Authorities in Opposition to plaintiff's motion for attorney fees and costs, declaration of Kim R. Blackseth, declaration of Jeffrey F. Harriman, Declaration of Michael E. Brown). (ys, COURT STAFF) (Filed on 2/22/2005) (Entered: 02/23/2005)
03/09/2005	78	Supplemental Declaration of PAUL L. REIN *IN Reply to [73] defendant's Opposition to plaintiff's motion for attorney's fees, litigation expenses, and costs* filed by Hollynn Delil. (Rein, Paul) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)

03/09/2005	79	Plaintiff's Memorandum of Points And Authorities In Reply To [73] Defendants' Opposition To An Award Of Attorneys' Fees . . . " filed by Hollynn Delil. (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/005 (ys, COURT STAFF). (Entered: 03/09/2005)
03/09/2005	80	Declaration Of Sidney J. Cohen In Reply To [73] Defendants' Opposition To Plaintiff's Motion For An Award Of Attorney Fees . . . filed by Hollynn Delil. (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)
03/09/2005	81	Declaration Of Hollynn Delil In Support Of 79 Plaintiff's Reply To Defendants' Opposition To Plaintiff's Motion For An Award Of Attorney Fees., (Exh. filed manually at Clerk's Office). filed by Hollynn Delil. (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)
03/09/2005	82	CERTIFICATE OF SERVICE of 78, 79, 80, 81 by Hollynn Delil *Certificate Of Service* (Cohen, Sidney) (Filed on 3/9/2005) Modified on 3/10/2005 (ys, COURT STAFF). (Entered: 03/09/2005)

03/29/2005	83	Minute Entry: Motion Hearing held on 3/25/2005 before Illston (Date Filed: 3/29/2005). (Court Reporter C. Luciano.) (ts, COURT STAFF) (Date Filed: 3/29/2005) (Entered: 03/29/2005)
03/29/2005		Set/Reset Deadlines as to 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic]. *Motion Hearing set for 4/8/2005 09:00 AM. (ys, COURT STAFF) (Filed on 3/29/2005) (Entered: 03/30/2005)*
04/08/2005	84	Supplemental Declaration of Sidney J. Cohen in Support of 58 MOTION for Attorney Fees *PLAINTIFF'S NOTICE OF MOTION FOR AN AWARD OF ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS AGAINST DEFENDANTS POINT REYES SEASHORE LODGE, JEFFREY F. HARRIMAN, AND THOMAS R. HARRIMAND* [sic] *AND CERTIFICATE OF SERVICE THEREO* [sic] *filed by Hollynn Delil. (Related document(s) 58) (ys, COURT STAFF) (Filed On 4/8/2005) (Entered: 04/11/2005)*

04/11/2005	85	Minute Entry: Motion Hearing held on 4/8/2005 before Illston (Date Filed: 4/11/2005). (Court Reporter Skillman.) (ts, COURT STAFF) (Date Filed: 4/11/2005) (Entered: 04/11/2005)
08/09/2005	86	ORDER by Judge Illston granting 58 Motion for Attorney Fees (ts, COURT STAFF) (Filed on 8/9/2005) (Entered: 08/09/2005)
09/02/2005	87	NOTICE OF APPEAL as to 57 Order, 86 Order on Motion for Attorney Fees, 54 Order Dismissing Case by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman, Filing fee $ 255, receipt number 3376070. Appeal Record due by 10/3/2005. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)
09/02/2005	88	Representation Statement by Point Reyes Seashore Lodge, Jeffrey F. Harriman, Thomas R. Harriman's counsel Michael E. Brown. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)
09/02/2005		Transmission of Notice of Appeal, Appeal Filing Information and Docket Sheet to US Court of Appeals re [87] Notice of Appeal. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)

09/02/2005	Copy of Notice of Appeal and Docket sheet mailed to all counsel. (ys, COURT STAFF) (Filed on 9/2/2005) (Entered: 09/02/2005)

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Attorneys for Plaintiff
HOLLYNN DELIL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOLLYNN DELIL Plaintiff, v. POINT REYES SEASHORE LODGE; JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN; and DOES 1-25, Inclusive, Defendants. /	CASE NO. C 03 0010 SI EMC *Civil Rights* **CERTIFICATION THAT SETTLEMENT OF ALL ASPECTS OF THE LAWSUIT HAVE NOT OCCURRED** (Filed Jun. 03, 2004)

I, Sidney J. Cohen, declare and certify as follows:

1. I am lead counsel for plaintiff Hollynn Delil in this action.

2. I certify that a settlement of all aspects of this lawsuit have not occurred.

3. I request that the March 23, 2004 "ORDER OF DISMISSAL UPON SETTLEMENT" be vacated and that the case forthwith be restored to the calendar for further proceedings.

I declare under penalty of perjury that the foregoing is true and correct, and that this Certification was executed this 3rd day of June, 2004.

/s/ Sidney J. Cohen
Sidney J. Cohen
Attorney for Plaintiff
Hollynn Delil

[Proof Of Service Omitted In Printing]